IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

SUSAN CHANG, AS NEXT FRIEND OF ALISON CHANG, A MINOR, AND JUSTIN HO-WEE WONG,	§	
Plaintiffs,	§	CA No. 3:07-cv-1767
V.	§	
VIRGIN MOBILE PTY LTD.,	§	
Defendant.	§	

DEFENDANT VIRGIN MOBILE (AUSTRALIA) PTY LTD.'S OPPOSITION TO PLAINTIFFS' MOTION FOR THIRD EXTENSION TO FILE AN OPPOSITION ON DEFENDANTS' MOTION TO DISMISS

Defendant Virgin Mobile (Australia) Pty Ltd. ("Defendant" or "Virgin Australia") files this opposition to Plaintiffs Susan Chang a/n/f Alison Chang and Justin Ho-Wee Wong's third motion for an extension to file an opposition to Defendant's motion to dismiss. Plaintiffs have moved for a third extension based on: (1) the location of a third party's alleged U.S. computer servers; and (2) an alleged technology agreement to provide telecommunications services to Virgin by another Australian third party. For the reasons discussed below, both bases fail to establish the Court's personal jurisdiction over Virgin, and the Court should deny Plaintiffs' instant motion.

I. FACTUAL BACKGROUND

As the Court will recall, this case concerns Plaintiffs Chang's and Wong's complaint that one of Wong's photographs of Chang that Wong uploaded and published on the World Wide Web for commercial use was improperly incorporated into a marketing advertisement shown exclusively in Australia. Plaintiffs sued Virgin Australia for running the Australia ad-shell

Dockets.Justia.com

advertisement (bus shelter poster) containing the Chang photograph that Defendant purchased from an Australian third party marketing vendor (Host) that utilized an Australian sub contractor (The Glue Society) to select the Chang photograph from the World Wide Web. Previously, the Plaintiffs dismissed both Virgin Mobile USA LLC (which is not affiliated with Defendant) and Creative Commons Corporation (which supplied the form agreement that Wong selected to publish his more than 10,000 photographs to the world, including his picture of Chang).

II. PROCEDURAL BACKGROUND

Virgin Australia filed its motion to dismiss on December 20, 2007 on the basis that it exclusively operates in Australia; has no contacts with the United States; and is not subject to personal jurisdiction in Texas, let alone the United States. On January 2, 2008, Plaintiffs moved to extend their response date to April 10, 2008. Virgin did not oppose Plaintiffs' first motion to extend. On February 22, 2008, Plaintiffs filed a second request for an extension of their response date, to June 9, 2008.

Plaintiffs have now filed a third request for an extension to respond to Defendant's motion to dismiss by July 24, 2008. The identified bases for a third extension are to: (1) investigate the location of the computer server(s) utilized by the Internet company Yahoo for the photographs uploaded by Plaintiff Wong to the World Wide Web; and (2) investigate another Australian company who provided technology services to Defendant Virgin Australia.

III. ARGUMENTS AND AUTHORITIES

Defendant has answered and supplemented its answers to Plaintiffs' discovery on jurisdictional issues in this case. Moreover, Defendant has hosted and presented its two corporate witnesses responsive to Plaintiffs' 30(b)(6) deposition notice on jurisdictional issues. Plaintiffs, however, now seek a third extension to subpoena information from Yahoo about the location of its computer servers, and to possibly name an Australian company that is paid to provide network services in Australia to Virgin Australia.

A. A Third Party's Computer Server Does Not Create Personal Jurisdiction

As discussed below, **no** personal jurisdiction is created by a company's interaction with a server located in an undisclosed location solely based on the server company (which may or may not be Yahoo in this case). *See Ray v. Experian*, 2007 U.S. Dist. LEXIS 88425, at *8-9 (N.D.Tex. Nov. 30, 2007) (J. Buchmeyer); *see also, Amberson Holdings LLC v. Westside Story Newspaper*, 56 U.S.P.Q.2d 1847, 1850 (D.N.J. 2000).

In *Ray v. Experian*, the plaintiffs alleged that the defendant bank had violated the Fair Credit Reporting Act due in part to the defendant's negligence. *Ray*, 2007 U.S. Dist. LEXIS 88425 at *1-2. The defendant bank, located in North Carolina, moved to dismiss the lawsuit for lack of personal jurisdiction. In response, the plaintiffs argued that the court had personal jurisdiction over the defendant bank because of its "electronic communication with Experian's computer servers in Texas concerning" plaintiff's financial information. *Id*. at *8-9. This District, however, stated that accessing a server physically located in Texas does **not** give rise to personal jurisdiction here. *Id*. at *9 ("accessing or sending data in North Carolina to or from a database which happens to be headquartered in Texas is not *purposeful* availment") (emphasis in original); *see also, Laughlin v. Post*, 1997 U.S. Dist. LEXIS 4987 (N.D.Tex. Mar. 12, 1997) (J. Buchmeyer) ("accessing published information in California from a computer database service, which happens to be headquartered in Texas, are not *purposeful* availments by [defendant] of the benefits and protections of Texas' law") (emphasis in original).

The same is true here. Like the defendant bank in *Ray*, Virgin Australia is not located, nor does it transact business, in Texas. Simply because a server where Wong's and Chang's pictures are stored may theoretically be located in Texas does not give rise to any level of personal jurisdiction. *Id*. at *9. That is, even if Virgin Australia accessed Yahoo's server (which Virgin Australia denies, and assuming *arguendo,* that the Yahoo server is located in Texas), "such accessing or sending" does not constitute any purposeful availment giving rise to the Court having personal jurisdiction over Virgin Australia. Moreover, while the location of Yahoo's servers may be of interest anecdotally, it serves no basis whatsoever (in law or in fact) to create personal jurisdiction over Virgin Australia in this case. Therefore, Plaintiffs' proposed exploration of this topic is moot as to the pending motion to dismiss.

Even if the Court theoretically assumes that Yahoo's server is in Texas, that fact alone is still insufficient to support the Court's proposed exercise of personal jurisdiction over Virgin Australia. In *TravelJungle v. American Airlines, Inc.*, 212 S.W.3d 841, 850 (Tex. App.-Fort Worth 2006, no writ), the Second District, Forth Worth Court of Appeals opined that the location of a server matters only when it "specifically arises out of the conduct of which [plaintiff] complains." That is, in *TravelJungle* and the cases cited therein, specific jurisdiction is conferred via server location only when the alleged harm being claimed in the complaint is directed **towards the server**. *Id*. at 847, 850 (repeated unauthorized access to server affected server performance by using "valuable computer capacity").

Plaintiffs cannot, and are not in any position to, make a similar claim here. First, the server at issue does not even belong to Plaintiffs, nor are they even remotely affected by the server's performance. Second, Plaintiffs' complaint contains no allegations of harm to the server, *i.e.*, conduct that affected the server's performance. Therefore, Yahoo's server location, regardless of where it is, remains a mere fortuity that is completely insufficient to establish personal jurisdiction over Virgin Australia in Texas in this case. *Ray*, 2007 U.S. Dist. LEXIS 88425 at *9, *Laughlin*, 1997 U.S. Dist. LEXIS 4987 at *23-24; *see also, Turner Schilling, LLP v. Gaunce Management, Inc.*, 247 S.W.3d 447, 456 (Tex. App.-Dallas 2008, no writ).

B. The Purchase of a Foreign Third Party's Telecommunications' Services Does Not Create Personal Jurisdiction

Plaintiffs also seek a third extension based on the proposed inclusion of yet another Australian company that may provide some back office telecommunications services purchased by Virgin Australia. This as-yet undeveloped argument depends on another Australian company having operating agreements as a mobile phone provider with foreign companies - including U.S.-based mobile phone service providers. This theory, however (which is predicated on an assemblage of various companies tangentially spanning the continents) equally fails to provide a jurisdictional basis to compel Virgin Australia to submit to personal jurisdiction in the Northern District of Texas.

In *Access Telecom v. MCI Telecommunications*, 197 F.3d 694, 717-18 (5th Cir. 1999), the Fifth Circuit refused to find personal jurisdiction on an analogous fact pattern involving phone service. In that case, Access sued multiple telecommunications companies over their alleged interference with Access' phone business for calls from Mexico to the U.S. *Id*. at 701-03. One of the defendants that Access sued was Telmex, a Mexican telecommunications company that had contracts with U.S. telephone carriers to facilitate calls originating to and from Mexico and the U.S. *Id*. at 717. Telmex was partly owned by SBC, which has significant contacts in Texas. *Id*.

The Fifth Circuit held that, while Telmex has numerous systematic and continuous contacts, Telmex's activities amounted to "doing business *with* Texas, [not]…doing business *in* Texas." *Id*. (emphasis in original). The court noted that, in order to enable long distance communications, "Mexican and U.S. telecommunications companies do business *with* each other in these situations, but neither is doing business *in* the other country for jurisdictional purposes." *Id*. (emphasis in original).

The Fifth Circuit also stated that the fact that SBC (which has significant contacts in Texas) partly owned Telmex did **not** result in a Texas court being able to exercise personal jurisdiction over Telmex. The Fifth Circuit held that "the corporate independence of companies defeats the assertion of jurisdiction over one by using contacts with the other." *Id.* at 717 (citations omitted).

It is clear here that any affiliation that Virgin Australia has with a third party telecommunications company is irrelevant to the jurisdiction issue. Two of Virgin Australia's corporate representatives have been deposed about the company's lack of contacts with Texas. In addition, there has been numerous written discovery served on Virgin Australia specifically inquiring about its relationship with Optus. Plaintiffs, however, still have **no** evidence that Virgin Australia would/could be subject to personal jurisdiction in Texas based on some alleged technology relationship with an Optus company. As Graham Milne (one of Virgin Australia's 30(b)(6) witnesses) testified in his deposition on April 23, 2008, the Optus company that sells its network support to Virgin Australia is deployed only in Australia. Moreover, there is only a gateway out of Optus to an international network that would allow an international phone call to be placed. APP 1 – 4 (Milne Deposition at 36:2-5; 19:16-23; 22:4-18) .[1]

As previously discussed, however, the *Accent Telecom* case makes clear that even in the event that a third party Optus company is doing business with a company that is eventually doing business in Texas (*e.g.,* Sprint), that is not the same as doing business in Texas for the purposes

[1] Pursuant to Local Rule 7.1(i), Defendant has included the documentary evidence supporting its opposition to Plaintiffs' motion for an extension in a separate Appendix. The pages of the Appendix are cited as "APP__."

of establishing personal jurisdiction. Plaintiffs' request for more time to explore the issue of yet another foreign telecommunications provider, therefore, will still prove to be of no avail in responding to Defendant's motion to dismiss.

Finally, even if the Court assumes, *arguendo,* that Optus' contacts with the United States may be imputed to Virgin Australia (which Virgin Australia denies), the Fifth Circuit has clearly ruled that any telecommunications business between a U.S. telephone carrier and a foreign carrier for enabling long distance does **not** rise to "doing business *in* the other country for jurisdictional purposes." *Access Telecom*, 197 F.3d at 717 (emphasis in original). Thus, Plaintiffs' attempted discovery of this line of information is also moot, and will only serve to waste the Court's, the parties', and the third parties' time and resources to no avail.

IV. CONCLUSION

Defendant has shown that Plaintiffs' reasons for seeking another extension to respond to Defendant's motion to dismiss are not justified and are not relevant to the motion. Accordingly, the Court should deny Plaintiffs' third motion for extension of time to respond to Defendant's motion to dismiss for lack of personal jurisdiction.

Respectfully submitted,

BAKER & McKENZIE LLP

/s/ Lisa H. Meyerhoff

Lisa H. Meyerhoff
Texas Bar No. 14000255
Email:Lisa.Meyerhoff@Bakernet.com
BAKER & McKENZIE LLP
2300 Trammell Crow Tower
2001 Ross Avenue
Dallas, TX 75201
Telephone: 214 978 3000
Facsimile: 214 978 3099

Myall S. Hawkins
Texas Bar No. 09250320
Email: Myall.Hawkins@Bakernet.com
Todd Y. Brandt
Texas Bar No. 24027051
Email: Todd.Brandt@Bakernet.com
Tan Pham
Texas Bar No. 24046628
Email: Tan.Pham@Bakernet.com
BAKER & McKENZIE LLP
711 Louisiana, Suite 3400
Houston, Texas 77002
Telephone: 713 427 5000
Facsimile: 713 427 5099

ATTORNEYS FOR DEFENDANT
VIRGIN MOBILE (AUSTRALIA) PTY, LTD.

CERTIFICATE OF SERVICE

I hereby certify that, on the 14TH day of May 2008, I electronically filed the foregoing "Defendant Virgin Mobile (Australia) Pty, Ltd.'s Opposition to Plaintiffs' Motion for Third Extension to File Opposition on Defendant's Motion to Dismiss" with the Clerk of Court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the Court. The electronic case filing system sent a "Notice of Electronic Filing" to the following attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means:

Bryant A. Fitts
Ryan H. Zehl
Fitts Zehl LLP
5065 Westheimer Rd., Suite 700
Houston, Texas 77056
Email: rzehl@fittszehl.com

/s/ Lisa H. Meyerhoff